Filed 8/19/04 H&F Farms v. WCAB CA5

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

H & F FARMS et al., Petitioners, v. WORKERS' COMPENSATION APPEALS BOARD and BENITO VELASQUEZ, Respondents.	F045102 (WCAB No. FRE 0209268) **OPINION**

THE COURT*

ORIGINAL PROCEEDINGS; petition for writ of review.

Stockwell, Harris, Widom & Woolverton and Renee D. Logoluso, for Petitioners.

No appearance by Respondent Workers' Compensation Appeals Board.

Lawrence T. Musso, for Respondent Benito Velasquez.

-ooOoo-

*Before Harris, Acting P.J., Cornell, J., and Dawson, J.

H & F Farms and its workers' compensation insurer California Indemnity Insurance Company (California Indemnity) petition for a writ of review contending the Workers' Compensation Appeals Board (WCAB) erred in not extending the 90-day period of control over an injured employee's medical care where the employee refused treatment from the employer's health maintenance organization (HCO). (Lab. Code, [1] §§ 4600.3, 5950; Cal. Rules of Court, rule 57.) We will deny the petition.

BACKGROUND

Benito Velasquez began working as a laborer for H & F Farms in Reedley in early June 2002 and signed a form indicating his intent to enroll in an HCO to treat any work related injuries. Although Velasquez did not specify which of three available HCOs he wished to enroll, H & F Farms had previously selected California Indemnity's Sierra at Work Spectrum program for treatment with Sierra Industrial Health Care (Sierra) as its preferred HCO provider.

On June 20, 2002, a forklift hit Velasquez while he was working for H & F Farms. He was immediately treated by Dr. Robert D. Wendel at Sierra that day and again on June 24, 2002, and July 8, 2002. Dr. Wendel diagnosed Velasquez with metatarsal (toe bone) fractures and various contusions and abrasions in each foot. The doctor released Velasquez to perform limited sitting work duties and instructed him to return for treatment in two weeks. Velasquez instead began treating the next day with the chiropractic office of Accident Helpline Medical Group (Accident Helpline).

On June 28, 2002, and July 1, 2002, California Indemnity wrote Velasquez reminding him that Sierra would treat his injury per his chosen HCO selection. The letters provided Velasquez with a telephone number to contact the HCO should he wish to change his treating physician.

---

[1] Further statutory references are to the Labor Code.

According to Velasquez's supervisor, Velasquez never returned to work to perform limited fruit sorting and box assembly duties. Velasquez's family intimated that Velasquez was insulted because "this type of work was a job for a woman." Velasquez later explained that he returned to work for two days and that he simply said even a woman could do the job, but that it did not matter because he could not work at all.

On July 18, 2002, a legal assistant with Velasquez's newly retained counsel faxed California Indemnity a demand for numerous documents. The legal assistant wrote that Velaquez's new primary treating physician at Accident Helpline found Velasquez fully temporarily disabled and that he would therefore not be returning to work despite Dr. Wendel's release to perform modified duties. The legal assistant also demanded California Indemnity continue making temporary disability indemnity payments.

California Indemnity responded by informing both Accident Helpline and Velasquez that treatment outside the HCO network was unauthorized and California Indemnity therefore would not reimburse Accident Helpline for Velasquez's medical services. California Indemnity provided Velasquez with four alternate podiatrists within the HCO network and scheduled an August 1, 2002, appointment with one of the physicians. Velasquez refused treatment from any HCO provider and continued treating with Accident Helpline.

On January 21, 2003, Accident Helpline filed a lien claim with the WCAB against California Indemnity listing $5,321.45 in Velasquez's medical charges through October 7, 2002. The lien claim included a form indicating Velasquez's intent to choose Accident Helpline as his treating physician; Velaquez signed the form on July 9, 2002, and a representative of Accident Helpline signed on July 12, 2002.

The WCAB conducted an expedited hearing on February 19, 2003. Velasquez testified that he stopped seeking treatment with Sierra and did not attend his follow up appointment because he "wasn't feeling any relief" and "wasn't feeling well." He also said he did not attend appointments scheduled by the HCO or H & F Farms because

Gabriele at his attorney's office told him not to attend. The parties stipulated that California Indemnity payed Velasquez temporary disability payments between June 21, 2002, and July 8, 2002.

On February 27, 2004, a workers' compensation administrative law judge (WCJ) found Velasquez properly enrolled in the HCO. The WCJ also found Velasquez did not formally notify the employer of his change of physician until Accident Helpline filed its lien claim on January 21, 2003; the WCJ therefore ordered California Indemnity to provide Velasquez with temporary total disability benefits and pay for medical treatment per Accident Helpline's medical reporting beginning as of that date. The WCJ deferred determining Velasquez's level of permanent disability and reserved jurisdiction over any other remaining issues as he was not yet permanent and stationary.[2]

Both sides petitioned the WCAB for reconsideration. Velasquez argued H & F Farms did not properly enrolled him in the HCO and that he notified California Indemnity of his change of treating physician on July 18, 2002, not January 21, 2003. H & F Farms and California Indemnity claimed they were entitled to an additional 74 days of medical control to satisfy their statutory right to control Velasquez's medical treatment for a full 90 days, and that any non-HCO medical reporting during the period was inadmissible. The WCAB granted both petitions and agreed with the WCJ's findings.

---

2 The right to permanent disability compensation does not arise until the injured worker's condition becomes "permanent and stationary." (*Department of Rehabilitation v. Workers' Comp. Appeals Bd.* (2003) 30 Cal.4th 1281, 1292.) "A disability is considered permanent after the employee has reached maximum improvement or his or her condition has been stationary for a reasonable period of time." (Cal. Code Regs., tit. 8, § 10152.)

DISCUSSION

Petitioners reiterate their contention the WCAB misapplied the workers' compensation laws by not awarding the employer medical control over Velasquez for an additional 74 days to make up for the period he was being treated outside the HCO with Accident Helpline. Petitioners argue their right to control is significant because it permits the employer to enjoy the treating physician's presumption of correctness. (§ 4062.9.) Petitioners also claim Velasquez's self-procured medical reporting from Accident Helpline is inadmissible and that he should not receive temporary disability during the period of non-compliance.

Workers' compensation statutes must "be liberally construed by the courts with the purpose of extending benefits for the protection of persons injured in the course of their employment." (§ 3202.) The parties, however, "are considered equal before the law" in proving all issues by a preponderance of evidence. (§ 3202.5) In reviewing an order, decision, or award of the WCAB, we must determine whether, in view of the entire record, substantial evidence supports the WCAB's findings. (§ 5952; *Braewood Convalescent Hospital v. Workers' Comp. Appeals Bd.* (1983) 34 Cal.3d 159, 164.) Thus, if the WCAB's findings " ' "are supported by inferences which may fairly be drawn from evidence even though the evidence is susceptible of opposing inferences, the reviewing court will not disturb the award." ' " (*Judson Steel Corp. v. Workers' Comp. Appeals Bd.* (1978) 22 Cal.3d, 658, 664.)

A California employer has a statutory obligation to furnish medical treatment to an injured employee. (§ 4600.) The employer has the right to control the employee's medical treatment for 30 days after the injury is reported, unless the employee has notified the employer in writing before the injury that the employee has a personal physician, chiropractor, or acupuncturist. (*Ibid*.) Even within the first 30 days after injury, an employee may request a one-time change of physician. (§ 4601.) "This statutory right is intended to motivate the employer to arrange for treatment with a

physician who will be acceptable to the employee and to motivate the physician to establish a good doctor-patient relationship with the employee so that the employee will not request a change of physicians at the end of the 30-day period." (2 Hanna, Cal. Law of Employee Injuries and Workers' Compensation (rev. 2d. ed. 2003) § 22.01[2], p. 22-9.)

If an employer fails or refuses to provide medical treatment during its period of control, "then he loses the right to control the employee's medical care and becomes liable for the reasonable value of self-procured medical treatment." (*Braewood Convalescent Hospital v. Workers' Comp. Appeals Bd., supra,* 34 Cal.3d at p. 165.) An employer's right to control medical care was significant because the primary treating physician was often entitled to the presumption of correctness under former section 4062.9. (See *Ordorica v. Workers' Comp. Appeals Bd.* (2001) 87 Cal.App.4th 1037, 1044.) The presumption, however, was recently repealed effective April 19, 2004, and no longer applies, even to injuries occurring before the presumption was abolished. (Sections 22 and 46 to 49 of Stats. 2004, ch. 34 (Sen. Bill. No. 899).)

An employer alternatively has the option of contracting with an HCO to treat its employees. (§ 4600.3, subd. (a)(1).) Such an employer retains medical control over the treatment of HCO covered employees for 90 days from the date the injury is reported.[3] (§ 4600.3, subd. (c)(1).) Employees may, however, designate a personal physician, chiropractor, or acupuncturist before the date of injury, effectively overriding the HCO contract. (§ 4600.3, subd. (a)(1).) The employer must give every employee an affirmative choice at the time of employment and at least annually thereafter to designate or change the designation of an HCO or personal physician; any employee who fails to

---

[3] An employer additionally retains control over HCO covered employees for 180 days from the date the injury is reported if the employer pays for more than one-half the cost of health care coverage for nonoccupational injuries or illnesses or such coverage is established under a collective bargaining agreement. (§ 4600.3, subds. (c)(2) & (c)(3).)

select a personal physician, chiropractor, or acupuncturist must be treated by the HCO. (*Ibid*.)

The WCAB concluded the petitioners were not liable for the costs of Velasquez's self-procured treatment within the employer's medical control period where he intentionally refused to cooperate with the provisions of the HCO contract. If Velasquez was unhappy with his medical care, he possessed the statutory right to request a one-time change of physicians within the HCO (§ 4600.3, subd. (e)) or a second opinion under the agreed or qualified medical examination process (§§ 4061, 4062). The WCAB found his failure to do either precluded him from obtaining retroactive temporary disability indemnity or reimbursement for self-procured medical expenses during the period the employer was entitled to exercise medical control under section 4600.3. Lacking a statutory remedy for an employee's failure to comply with section 4600.3, the WCAB refused to extend the 90-day control period. The WCAB instead concluded "that it is sufficient that defendant has no liability for benefits during the control period and during the period of intentional lack of cooperation."

Petitioners contend the WCAB should have afforded them the same remedy awarded the employer in *Ordorica v. Workers' Comp. Appeals Bd., supra,* 87 Cal.App.4th at p. 1037. Although *Ordorica* did not involve an HCO contract, the employee refused to return to the employer's physician within the first 30 days of medical control under section 4600. After finding the employee deliberately deprived the employer of its right to control, the WCAB extended the employer's medical control period by two days to permit the employer's physician to examine the employee and issue a report. (*Ordorica, supra,* at p. 1044.) As with Velasquez, the employee in *Ordorica* admitted that he did not return to the employer's physician upon advise from his counsel. (*Ordorica, supra,* at p. 1042.)

Although the evidence here is similar to that in *Ordorica*, the WCJ and WCAB made the express finding that Velasquez sought treatment from Accident Helpline

because he was not receiving relief from Dr. Wendel's care. Even though this court might have viewed the evidence differently, we are bound to accept the WCAB's finding supported by substantial evidence. (*Ordorica, supra,* 87 Cal.App.4th at p. 1047.) Velasquez testified that he stopped treatment with the HCO and began treatment with Accident Helpline upon advise from his counsel because he "wasn't feeling any relief" and "wasn't feeling well." The WCJ found that "a review of the applicant's testimony (under cross-examination) reveals that it was not his intent to malinger or to manipulate the system." We may not find any deceptive intent in Velasquez's actions where the WCAB expressly found his conduct reasonable. The *Ordorica* remedy is therefore inapplicable here. Moreover, the benefit of such a remedy to the employer is in doubt in light of the recent elimination of the treating physician's presumption.

In summary, petitioners fail to demonstrate the WCAB's remedy of disallowing temporary disability and medical expenses while the treatment Velasquez received outside the HCO network was inadequate to address his failure to comply with the relevant workers' compensation statutes. The WCAB never ruled on the petitioners' contention as to the admissibility of Accident Helpline's medical reporting during the employer's 90-day period of medical control; we therefore express no opinion on the matter as the issue remains before the WCAB in assessing Velasquez's level of permanent disability. Petitioners last contention is moot as the WCAB has already explained in its opinion and decision after reconsideration at page six that Velasquez "is not able to obtain reimbursement of medical treatment or indemnity benefits during this period of non-cooperation."

DISPOSITION

The petition for writ of review and respondent's request for attorney fees are denied. This opinion is final forthwith as to this court.